Supreme Court, U.S.
FILED

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NO.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

BRIAN OVERBEEK, Petitioner

-vs-

CHARLES HEIMBECKER, RICHARD HELLENBRAND, and GENERAL CASUALTY COMPANY OF WISCONSIN, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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39 pp

QUESTIONS PRESENTED FOR REVIEW

This case presents a question, under Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), about the authority of a Court of Appeals in a diversity case governed by state law to ignore a mandatory state statute and deny prejudgment interest based on equitable considerations.

This case also presents a question, under Erie R. Co. v. Tompkins, about the authority of a Court of Appeals in a diversity case governed by state law to ignore the facts of record and to infer circumstantially the existence of an adequate tender sufficient to toll the accrual of prejudgment interest, when state law does not permit such an inference.

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JURISDICTIONAL STATEMENT

The petitioner filed a complaint in the District Court for the Western District of Wisconsin invoking the District Court's diversity jurisdiction under 28 U.S.C. Section 1332 and 1391. After the District Court entered judgment for the petitioner but fixed the liability limit, denied prejudgment interest on any portion of the award, and denied costs, the petitioner appealed to the Circuit Court of Appeals for the Seventh Circuit, invoking that Court's jurisdiction under 28 U.S.C. Section 1291. The Seventh Circuit Court of Appeals affirmed the District Court's order on December 9, 1996. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1), and the Petition for Certiorari is timely filed under United States Supreme Court Rule 13.4.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

> [I]f the judgment is for the recovery of money, interest at a rate of 12% per year from the time of verdict...until judgment is entered shall be computed by the clerk and added to the costs.

Wisconsin Statutes Annotated 814.04(4).

STATEMENT OF THE CASE

Petitioner, Brian Overbeek, was riding on a motorcycle in Wisconsin in 1985, when respondent Heimbecker drove an automobile across the center line and into Overbeek, rendering him a quadriplegic. Heimbecker and his passenger, Hellenbrand, had been drinking beer from a keg in the car for several hours and were intoxicated at the time of the collision.

In 1986, Overbeek sued both Heimbecker and Hellenbrand, the owner of the car, as well as Hellenbrand's insurance carrier, General Casualty of Wisconsin ("Casualty"). After a 1987 trial, the jury returned a verdict finding Heimbecker and Hellenbrand liable, awarding damages in the amount of $2,263,133, and denying punitive damages. The District Court entered judgment in that amount

against Heimbecker and Hellenbrand but entered no judgment with respect to Casualty.

Overbeek filed a notice of appeal regarding denial of punitive damages, and the respondents filed notices of cross-appeal. After these motions were filed, Overbeek filed further motions asking the District Court to correct its oversight and enter judgment against Casualty to the extent of its coverage of each defendant. The respondents argued that the total amount of the judgment should be $25,000.

Rather than enter a judgment order, the District Court instructed Overbeek's counsel either to accept the $25,000 or withdraw his notice of appeal and conduct an evidentiary hearing. Overbeek's counsel advised the District Court in writing that neither option was

appropriate.

On March 28, 1991, all appeals were dismissed. On August 22, 1995, Overbeek filed a motion to have a final judgment order entered as to Casualty. Overbeek sought a $50,000 judgment against Casualty plus costs and interest, the prejudgment interest to be calculated at 12% according to Wisconsin statute.

On March 21, 1996, the District Court entered judgment in favor of Overbeek and against Casualty in the amount of $25,000 "without prejudgment interest on this or any other portion of the judgment awarded originally and without costs." (App. 7) Overbeek's motion to alter or amend judgment was denied on April 4, 1996, and Overbeek filed a notice of appeal on April 17, 1996.

The Circuit Court of Appeals for

the Seventh Circuit filed an opinion on December 9, 1996, affirming the District Court's judgment. (App. 8)

ARGUMENT

I.

The Court of Appeals' Application of Equitable Considerations To Deny Prejudgment Interest Is Contrary To The Explicit Language Of The Governing State Statute And Violates The Doctrine of Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)

Wisconsin law supplies the rule for the award of prejudgment interest in this diversity case. Fort Howard Paper Co. v. Standard Havens, Inc., 901 F. 2d 1373, 1383 (7th Cir. 1990). By statute, interest in Wisconsin runs from the time of the verdict until judgment is entered, and the clerk is mandated to compute it at the rate of 12% per year. W.S.A. 814.04(4). There is no provision in this statute that permits a court to deny interest on equitable grounds. In Wisconsin, interest applies automatically, by operation of law.

Despite the mandatory language of the operative Wisconsin statute, the Court of Appeals for the Seventh Circuit upheld the District Court's decision to deny all statutory prejudgment interest. The Court of Appeals, like the District Court, found it "grossly unfair to make General Casualty pay interest which accrued solely due to the intransigence of plaintiff's counsel." (App. 13)

In support of the proposition that "equitable considerations can bar otherwise valid claims for interest," the Court of Appeals cited West Virginia v. United States, 479 U.S. 305, 311 n. 3 (1987) (App. 13) The West Virginia case referred to the equitable doctrine of laches, and in turn cited Board of Commissioners of Jackson County, Kansas, v. United States, 308 U.S. 343 (1939).

This Court's decision in Board of Commissioners points up precisely why equitable considerations are not appropriate in this case, governed as it is by Wisconsin statutory law. In Board of Commissioners, the Government's right to prejudgment interest had never been codified by Congress. This Court expressly noted that Congress left the matter for judicial determination "within the framework of familiar remedies equitable in their nature." 308 U.S. at 351. In the West Virginia case, as well, this Court noted that prejudgment interest was not governed either by state or federal statute or by local common law. 479 U.S. at 308-09.

In this case, prejudgment interest is governed by a Wisconsin statute that mandates computation of interest at 12% from the time of verdict until judgment

is entered. Further, the Wisconsin reviewing court has rejected laches, the applicable doctrine in West Virginia v. United States, as an exception to the accrual of statutory prejudgment interest in Wisconsin.

In Anderson v. Kojo, 110 Wis. 2d 22, 327 N.W. 2d 195 (1982), a plaintiff sought to enforce a judgment more than twelve years old and requested an amount of statutory interest that caused the original amount due to more than double. The reviewing court held that delay, even if occasioned by the plaintiff, was not cause to deny his action for the judgment amount and interest. The Wisconsin court rejected a laches argument, reasoning that the debtor was not prejudiced by the passage of time because it retained the use of the money. Indeed, the Seventh Circuit

Court of Appeals itself has appropriately pointed out that "the passage of time...is a reason to award interest, not to deny it." In re Oil Spill by the Amoco Cadiz, 954 F. 2d 1279, 1334 (7th Cir. 1992).

Nevertheless, in the face of unambiguous state authority that must govern in a diversity action, the Court of Appeals in this case applied an equitable argument to deny statutory prejudgment interest. This decision that a state statute and interpretive case law may simply be ignored is without precedent and must be overturned as violative of this Court's decision in Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), that a federal court in a diversity case must apply state law.

II.

The Court of Appeals' Finding Of A Tender Tolling The Accrual Of Interest Was Made In The Absence Of Any Supporting Evidence And Was In Contravention Of State Law, Thus Violating The Doctrine Of Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

The Court of Appeals held that General Casualty was not obligated to pay interest even on the minimal $25,000 policy limit because it "offered to pay" that sum and therefore "was no longer on the hook for any interest." (App. 12) However, the Court of Appeals did not address the following facts:

1. Casualty never offered to pay $25,000 plus the mandated statutory interest.

2. Casualty never tendered payment of any amount until September 22, 1995, when Casualty's attorney tried to hand Overbeek's counsel a check for $25,000

and no required statutory interest.

3. Casualty's attorney, in a letter dated September 13, 1995, conditioned payment of the $25,000 and no statutory interest on Overbeek's execution of a satisfaction of judgment.

The $25,000 check did not constitute legal tender because it was not the full amount due. The tender of an amount less than the full amount due, made on condition that it be accepted as satisfaction in full of an obligation, does not stop the running of interest on the entire debt amount; in such a case, interest continues to accrue on the full amount due if the amount due is greater than that tendered. Giffen v. Tigerton Lumber Co., 26 Wis. 2d 327, 132 N.W. 2d 572, 575 (1965); Loehrke v. Wanta Builders, Inc., 151 Wis. 2d 695, 445 N.W. 2d 717, 722 (1989).

In the face of undisputed evidence of the absence of a proper tender under state law, the Court of Appeals held that it was "convinced, given the circumstances of this case, that General Casualty had a check at the ready, and its repeated offers were sufficient to toll the accrual of interest." (App. 12) The Court cited no authority for this finding of a proper tender based only on "circumstantial evidence." Even "repeated offers" to pay less than the full amount are expressly not sufficient under Wisconsin law. Loehrke, supra.

Casualty always had the option of tendering $25,000 plus interest and costs to the Clerk of the Court in order to meet its obligation. Kiefert v. Maple Valley Mutual, 158 Wis. 340 (1914). By its own admission, it chose to forego that option in order to earn interest on

the $25,000. Its enjoyment of the benefit of holding Overbeek's money since the date of verdict is precisely the inequity which Wisconsin law seeks to correct through the assessment of interest. Nelson v. Travelers Insurance Co., 102 Wis. 2d 159, 306 N.W. 2d 71, 76 (1981).

The holding of the Court of Appeals for the Seventh Circuit that it could infer that Casualty had a check "at the ready" was based on no evidence. Further, the Court's finding of a valid tender in Casualty's "repeated offers" to settle (1) for a sum less than the total amount due (2) on condition that Overbeek execute a satisfaction of judgment directly contravenes governing Wisconsin law. Its decision must be overturned as violative of this Court's decision in Erie R. Co. v. Tompkins, 304

U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), that a federal court in a diversity case must apply state law.

CONCLUSION

For all of the foregoing reasons, the Petitioner, Brian Overbeek, respectfully urges that this Court's review is important and desirable in order to assure a result in compliance with dispositive state law, as required by this Court's opinion in Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

Respectfully submitted,

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March 7, 1997

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

BRIAN OVERBEEK,

Plaintiff,

v.

CHARLES HEIMBECKER, RICHARD HELLENBRAND & GENERAL CASUALTY COMPANY OF WISCONSIN,

Defendants.

OPINION AND ORDER

86-C-0450-C

Eight and one-half years after the jury returned a verdict in favor of plaintiff Brian Overbeek and three and one-half years after the parties stipulated to the dismissal of all appellate proceedings, plaintiff has moved for entry of judgment against defendant General Casualty Company. In 1985, plaintiff was rendered a quadriplegic after being hit by a car driven by defendant Charles Heimbecker and owned by defendant Richard Hellenbrand. Plaintiff brought suit against both men and defendant Hellenbrand's automobile insurer, defendant General Casualty, only to learn that the limits of Hellenbrand's insurance were $25,000 and that both men were essentially judgment proof. Despite this knowledge, plaintiff's counsel rejected all offers to accept the policy limits of $25,000, including one offer

made before he filed the suit. Plaintiff's counsel made two abortive and ethically questionable attempts to persuade each of the individual defendants to settle the suit for the policy limits as to that defendant only, leaving the other uncovered. Not surprisingly, defendants rejected these efforts. However, approximately six weeks before the start of trial, General Casualty offered double its policy limits in an attempt to resolve the case. Plaintiff rejected this offer as it had all previous ones.

Plaintiff's counsel went forward with an unnecessary trial on October 5, 1987, which was made much more difficult than it should have been by plaintiff's counsel's unfamiliarity with Wisconsin law and his failure to have anticipated and researched any of the unusual and difficult issues of state law that came up during the case. The jury found that the driver of the car, defendant Heimbecker, was acting as the servant of the owner, defendant Hellenbrand. The jury was not asked to decide whether defendant Hellenbrand committed any independent act of negligence.

After the liability phase of the trial had been concluded and before the damages phase began, I held a conference with counsel and asked plaintiff's counsel whether it made sense to proceed to determine damages in view of the facts that defendants had offered double the policy limits to resolve the case and that the individual defendants seemed to have no financial resources with which to satisfy any judgment against them. Counsel insisted on proceeding and obtained a jury verdict of $2,263,133. Less than a week later, counsel for defendant Heimbecker

wrote to plaintiff's counsel reiterating General Casualty's willingness to pay its policy limits of $25,000 in return for a satisfaction of judgment. (Defendant Heimbecker had no insurance coverage of his own; he was covered only through defendant Hellenbrand's insurance with General Casualty.) Again, plaintiff declined the offer. On October 28, 1987, judgment was entered for plaintiff and against defendants Heimbecker and Hellenbrand. Through inadvertence, no reference was made in the judgment to defendant General Casualty. Plaintiff's counsel said nothing about the omission but took an appeal of the case to the Court of Appeals for the Seventh Circuit. On December 17, 1987, the court of appeals ordered the parties to brief the question of jurisdiction, noting the absence of a final judgment as to General Casualty and a possible lack of timeliness in the filing of the notice of appeal.

In January 1988, plaintiff filed a motion in this court for an amendment of the judgment to add General Casualty "to the extent of its coverage therein." In a second motion, plaintiff asked the court to add General Casualty to the judgment "to the extent of its coverage as the parties may agree or as later may be determined." On February 12, 1988, a hearing was held on the motions, at which local counsel appeared in place of plaintiff's trial counsel. Counsel for General Casualty objected to the entry of a judgment that did not specify the amount of the policy limits. At the request of plaintiff's local counsel, I agreed to stay entry of any order to give local counsel an opportunity to consult with trial counsel and advise the court how

plaintiff wished to proceed. I indicated to counsel that if plaintiff wished to have the judgment vacated and a determination made of the coverage issue, it would be necessary to move to withdraw the appeal he had filed in the court of appeals. Plaintiff never moved to withdraw the appeal or filed anything further in this court until August 22, 1995,when he filed his motion for entry of judgment. (In the interim, however, he had taken the inexplicable step of suing defendant General Casualty in Cook County, Illinois, for $25,000 and interest on the October 28, 1987 judgment. This action was dismissed.)

In filing the August 22, 1995 motion for entry of judgment, plaintiff did not submit a proposed form of judgment or indicate in his moving papers what he expected the judgment to cover. It was not until the end of the hearing on the motion on September 22, 1995, that plaintiff made it known that he was seeking judgment against General Casualty in the amount of $50,000 (double the policy limits), costs and interest on the full amount of the $2,263,133 judgment entered in behalf of plaintiff on October 28, 1987. I denied the motion for costs as untimely and ordered the parties to brief plaintiff's entitlement to double the policy limits and payment of interest on the full amount of the judgment.

Plaintiff complied with the order and now asserts his right to be awarded double the policy limits, together with interest on the full amount of the judgment. With respect to the double policy limits argument, he argues that the "base judgment" should be $50,000 because both Hellenbrand and Heimbecker are covered persons and the

contract of insurance provides for payment of $25,000 for each covered person. He cites no law for this proposition and makes no reference to any of the hurdles he would have to overcome before he could prevail on his argument. For example, plaintiff has never argued before that the contract should be read in the manner he now urges. Under Wisconsin law it is his burden to prove that his claims come within the coverage of the contract. Just v. Land Reclamation, Ltd., 151 Wis. 2d 593, 605, 445 N.W. 2d 683, 688 (Ct. App. 1989), reversed on other grounds, 155 Wis. 2d 737, 456 N.W. 2d 570 (1990). Generally, he must make this showing at trial. In this case, plaintiff adduced no evidence at trial to prove his contention that the insurance contract provides for payment of the policy limits for both defendants Hellenbrand and Heimbecker. To do so, he would have had to establish active negligence on the part of both men because the law in Wisconsin is that a finding of vicarious liability does not lead to dual coverage. Landsinger v. American Family Mutual Insurance Co., 142 Wis. 2d 138, 142-43, 417 N.W. 2d 899, 900 (Ct. App.) (where liability is vicarious, running from servant to master, only the single person limit applies), review denied, 417 N.W. 2d 896 (1987). Defendant Hellenbrand was not found actively negligent; his liability was strictly vicarious as the owner of the car and the "master" of the driver, Heimbecker. Therefore, the policy limits are $25,000 for the active negligence of defendant Heimbecker. Furthermore, the policy itself provides that coverage is limited to one person:

> The limit of liability shown in the Declarations for "each person" for Bodily Injury Liability is our maximum limit of liability for all damages for bodily injury sustained by any one person in any one auto accident... This is the most we will pay regardless of the number of covered persons, claims made, vehicles or premiums shown in the Declarations, or vehicles involved in the auto accident.

General Casualty policy, Exh. A, Affidavit of Mark W. Andrews, dated Oct. 20, 1995. (Emphasis in original.)

Plaintiff's argument that General Casualty owes post-judgment interest on the full amount of the judgment entered is as frivolous as his double policy limits argument. No judgment was ever entered against General Casualty so as to trigger an independent obligation to pay post-judgment interest. Its obligation to pay post-judgment interest on the judgment entered against its insureds is limited by the terms of its policy, which provide that the company will pay interest on any judgment entered in any suit it defends, but that the duty to do so ends when the company offers to pay "that part of the judgment which does not exceed [its] limit of liability for this coverage." Once the company offered the policy limits on October 15, 1987, one week after the verdict was rendered and a week before entry of judgment, its obligation to pay interest expired.

Plaintiff argues that General Casualty should be liable for prejudgment interest on the full amount of the award,

but there is nothing to this argument. Under Wisconsin law, which supplies the rule for the award of prejudgment interest in this diversity case, Fort Howard Paper Co. v. Standard Havens, Inc., 901 F. 2d 1373, 1383 (7th Cir. 1990), prejudgment interest is awarded only when the sum owed is fixed and certain. Loehrke v. Wanta Builders, Inc., 151 Wis. 2d 695, 706, 445 N.W. 2d 717, 722 (Ct. App. 1989). Throughout these proceedings, plaintiff has refused to identify the amount of the fixed sum for liability coverage owed by General Casualty. Certainly, that sum is not $50,000, because there is no legal basis on which to hold General Casualty liable for double its policy limits, despite its generous offer to pay that amount in order to resolve the case prior to trial. Plaintiff has been consistently unwilling to agree that General Casualty's obligation is $25,000, although he had innumerable chances to agree to that amount and end this Jarndyce v. Jarndyce litigation. Because it has been plaintiff's counsel's intransigence that has prevented the amount of defendant's obligation from being reduced to judgment, it would be unfair to hold General Casualty liable for prejudgment interest.

It is time to end this unfortunate and ill-advised litigation over liability that was conceded almost ten years ago. Plaintiff's counsel has caused General Casualty to incur significant costs to defend his baseless motions and abused the resources of three different courts.

ORDER

IT IS ORDERED that the judgment entered herein on October 28, 1987, is AMENDED to add that judgment is entered in favor of plaintiff Brian Overbeek and

against defendant General Casualty Company of Wisconsin in the amount of $25,000.00, without prejudgment interest on this or any other portion of the judgment awarded originally and without costs. It is unnecessary to address the motion to strike filed by plaintiff on March 19, 1996, because I have not placed any reliance on the Wisconsin Court of Appeals' decision he believes should not be given consideration.

Entered this 21st day of March, 1996.

BY THE COURT:

Barbara B. Crabb

BARBARA B. CRABB

District Judge.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NO. 96-1957

BRIAN OVERBEEK,
Plaintiff-Appellant,

v.

CHARLES HEIMBECKER, RICHARD HELLENBRAND, and GENERAL CASUALTY COMPANY OF WISCONSIN,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin, No. 86-C-0450-C - Barbara B. Crabb, Judge.

ARGUED OCTOBER 31, 1996 -
DECIDED DECEMBER 9, 1996

Before POSNER, Chief Judge, and FLAUM and EVANS, Circuit Judges.

EVANS, Circuit Judge. Thirteen times General Casualty Company offered to settle a personal injury case against one of its insureds for the policy limit of $25,000. General Casualty made the offer before trial. General Casualty made the offer during the trial. General Casualty made the offer after trial. At times, General Casualty even offered double the policy limit to make the litigation go away.

Thirteen times the plaintiff's counsel rejected the offers and insisted on a trial and various other proceedings. Now, over 9 years after the trial wrapped up, plaintiff's counsel has knocked on our door, asking for 12 percent interest on not just the $25,000 owed under General Casualty's policy but also on a $2.2 million verdict rendered against its insured. Some might find this argument creative; most would find it frivolous. None would find it persuasive.

The underlying facts of this case are tragic. On June 1, 1985, Richard Hellenbrand tossed his car keys to his buddy, Charles Heimbecker, and the two zoomed off in Hellenbrand's Trans-Am. The pair took the phrase "one for the road" to new depths, bringing a tapped beer keg along for the ride. While driving along Gannon Road in rural Columbia County, Wisconsin, Heimbecker crossed the centerline and struck 22-year-old Brian Overbeek's motorcycle. The accident left Overbeek quadriplegic.

Overbeek sued Hellenbrand, Heimbecker, and Hellenbrand's automobile insurer, General Casualty, in district court. Unfortunately, on top of being incredibly irresponsible, both men were broke. Added to this mix was the fact that Hellenbrand's policy with General Casualty topped out at only $25,000, a sum not even remotely adequate to compensate Overbeek for his loss. But all things sad are not untrue. Realistically here, only $25,000 was available. Rather than accept reality, Overbeek's lawyer rejected General Casualty's repeated offers -- including one before the case was even filed -- to settle the case for the policy limit. Even offers of double the policy

limit wouldn't do. Instead, Overbeek's counsel insisted on presenting the case to the jury. On October 7, 1987, after a 3-day trial, a jury found that Heimbecker was negligent, and because he was acting as Hellenbrand's servant, General Casualty was required to pay on its policy. Two days later the jury fixed compensatory damages against Hellenbrand and Heimbecker at a little over $2.2 million but denied punitive damages. Both during and after the trial, General Casualty's offer to settle for the policy limit was refused.

On October 28, 1987, the district court entered judgment against Hellenbrand and Heimbecker but inadvertently failed to name General Casualty in the judgment. Neither party caught the omission. Then, Overbeek's lawyer, apparently not believing that Hellenbrand and Heimbecker would be just as judgment-proof on an additional award as they were on a $2.2 million judgment, appealed the jury's decision to deny punitive damages. Almost 9 years ago, on December 17, 1987, we noted the apparent absence of a final judgment against General Casualty and asked the parties to brief whether jurisdiction was proper. Subsequently, the case went back to the district court.

In January 1988 Overbeek filed a motion in the district court to amend the judgment to include General Casualty "to the extent of its coverage therein" or "to the extent of its coverage as the parties may agree or as later may be determined." General Casualty objected to the somewhat wishy-washy language of the proposed amendment and asked the court to enter judgment against it for $25,000. In a hearing on Overbeek's motion in February 1988, the district court stayed entry of

judgment against General Casualty at the request of Overbeek's local counsel.

That same day, Overbeek's lawyer dashed off a letter, informing the court that the judgment would be inappropriate and he would try pushing his luck without it on appeal. Three and a half years then went by without so much as a peep from Overbeek's lead counsel In March 1991 Overbeek's lawyer agreed to dismiss his appeals, but he didn't request the entry of judgment. Finally, in late 1995, after unsuccessfully suing General Casualty for $25,000 in Illinois state court, Overbeek's counsel resurfaced in district court, requesting entry of judgment against General Casualty for $50,000 plus over 8 years of prejudgment interest. Overbeek also requested that General Casualty fork over 12 percent interest on the $2.2 million judgment against Heimbecker and Hellenbrand. The district court rejected these arguments, entered judgment against General Casualty in the amount of $25,000, and denied interest and costs. Overbeek appeals.

Overbeek first argues that Wisconsin Statute Sec. 814.04(4) requires General Casualty to shell out 8 years of 12 percent interest on the entire $2.2 million judgment against the insureds. Only two hurdles lie in Overbeek's path: the law and common sense. In Blank v. USAA Property & Cas. Ins. Co., 200 Wis. 2d 270, 546 N.W. 2d 512 (Ct. App. 1996), a case conveniently ignored by Overbeek, the court rejected a strikingly similar argument, stating: "Section 814.04(4), Stats., does not impose interest on the verdict upon the insurer for sums in excess of policy limits. The statute merely directs the clerk how to compute

the interest on the verdict; contrary to plaintiff's contention, whether the insurer and not the insured is to pay this interest depends on the terms of their insurance contract." Id. at 281. General Casualty's policy with Hellenbrand notes only that it will pay interest on behalf of its insured arising **after** the judgment. However, even that obligation ends once the insurance company offers to pay the policy limits -- something General Casualty did repeatedly in this case.

As a practical matter, requiring General Casualty to pay interest on the $2.2 million judgment would make no sense. The purpose of postjudgment interest is not to punish a defendant but to encourage prompt payment and compensate a plaintiff for another party's use of its money. Nelson v. Travelers Ins. Co., 102 Wis. 2d 159, 169, 306 N.W. 2d 71, 76 (1981). First, general Casualty could not have been more prompt in offering the $25,000, for as we noted, it offered to pay before Overbeek even filed suit. Second, General Casualty was never responsible for the $2.2 million; that judgment was only against the insureds. It follows, then, that General Casualty could not have not inequitably retained use of the money and does not owe interest on the entire verdict.

Overbeek next argues that General Casualty is liable for over 8 years of interest on the $25,000 verdict against it. Again, we disagree. Once General Casualty offered the policy limits, it was no longer on the hook for any interest. While Overbeek complains that General Casualty did not formally tender a check to the clerk's office, we are convinced, given the circumstances of this case, that

General Casualty had a check at the ready, and its repeated offers were sufficient to toll the accrual of interest. Finally, the lion's share of the blame for the delay in entering judgment against General Casualty rests squarely on the shoulders of Overbeek's counsel. Instead of agreeing that the court should enter judgment against General Casualty for $25,000 in 1988, Overbeek's lawyer tried to wiggle out from under the policy limit by claiming dualcoverage. Counsel then disappeared until 1991, when he agreed to withdraw the appeal filed back in 1987. Next, in 1993 he tried to sue General Casualty for $25,000 -- an amount he wouldn't accept in district court -- in Illinois state court. Overbeek's lawyer didn't come up for air again until late 1995, when he asked for $50,000 plus costs and interest. As the district court noted, it would be grossly unfair to make General Casualty pay interest which accrued solely due to the intransigence of plaintiff's counsel. See West Virginia v. United States, 479 U.S. 305, 311 n. 3 (1987) (noting equitable considerations can bar otherwise valid claims for interest).

Finally, Overbeek claims that the district court abused its discretion in failing to award costs under Rule 54(d)(1). We think the district court's decision falls well short of an abuse of discretion. Rule 54(d)(1) gives a district court discretion to deny costs when exceptional circumstances are present. Smith v. DeBartoli, 769 F. 2d 451, 453 (7th Cir. 1985), cert. denied, 475 U.S. 1067 (1986). This case is chock full of exceptional circumstances. Overbeek's counsel inexplicably refused

over a dozen offers of the policy limit, needlessly pursued a trial, appealed the jury's decision not to award punitive damages even though the defendants were judgment-proof, vanished for large periods of time, frivolously argued for dual coverage, and even wasted time and resources hauling General Casualty into an Illinois court for no apparent reason. It's sad that only a pittance was available to Overbeek for his terrible injuries, but that fact could not be changed by a decade of protracted and needless litigation.

Finding no fault with any of the decisions of the district court, its judgment is AFFIRMED.

(2)

Supreme Court, U.S.
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No. 96-1792

In The

Supreme Court of the United States

October Term, 1996

BRIAN OVERBEEK,

Petitioner,

vs.

CHARLES HEIMBECKER, RICHARD HELLENBRAND and GENERAL CASUALTY COMPANY OF WISCONSIN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT GENERAL CASUALTY COMPANY OF WISCONSIN

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30 pp

QUESTIONS PRESENTED

1. Whether the District Court for the Western District of Wisconsin and the Court of Appeals for the Seventh Circuit properly ruled that the Petitioner was not entitled to prejudgment interest against Respondent, General Casualty, based upon the terms of General Casualty's contract of insurance and upon Wisconsin case law.

2. Whether the District Court for the Western District of Wisconsin and the Court of Appeals for the Seventh Circuit properly based their rulings on the undisputed fact that General Casualty offered to pay the Petitioner its policy limits (and sometimes more) on at least one dozen occasions, and upon the finding that the only reason payment was not accepted was Petitioner's counsel's intransigence.

LIST OF INTERESTED PARTIES AND STATEMENT PURSUANT TO RULE 29.6

None of the issues presented by this Petition pertain to the Respondents Heimbecker and Hellenbrand. The Respondent Hellenbrand has been granted a discharge in bankruptcy. The Respondent General Casualty Company of Wisconsin is a corporation. Ownership of General Casualty is divided as follows: 15% by Republic Insurance Company and 85% by Winterthur U.S. Holdings.

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INTRODUCTION

General Casualty opposes the Petition for Writ of Certiorari and relies upon the reasons which are fully articulated in both the Opinion and Order of Judge Barbara B. Crabb, entering Judgment in this matter before the District Court for the Western District Court of Wisconsin, and in the Opinion written by Judge Terence T. Evans of the Court of Appeals for the Seventh Circuit, affirming the District Court's Order.

The basis for rejection of the Petition is that the Petitioner completely ignores directly applicable contract language and directly applicable case law, despite the fact that the Court of Appeals pointed out that the Petitioner had already neglected both of these issues when making his appeal to that court.

(1) The Petitioner sued General Casualty on the basis of its contract of insurance and has asked the courts to render judgment and to impose prejudgment interest costs on the basis of the contract of insurance, but does not cite to the contract. Nor does he mention that the contract in question only obligates the insurer for interest *after* a Judgment is entered, and terminates even that obligation when the policy limits are "offered." It is undisputed that the policy limits were offered on numerous occasions. The Court of Appeals explicitly noted this flaw in Petitioner's argument, but the Petitioner ignores the Court of Appeals' comments in submitting the present Petition.

(2) The Petitioner asserts that Wisconsin law mandates that prejudgment interest be awarded under Wisconsin statute § 814.14(4), and asserts that the statute must be applied against General Casualty in this action. However, as the Respondent and the Court of Appeals pointed out in rejecting Petitioner's arguments on appeal, there is clear Wisconsin authority directly contrary to the Petitioner's position which he "conveniently

ignored" in appealing to that court. The case of *Blank v. USAA Property & Casualty Ins. Co.*, 200 Wis. 2d 270, 281, 546 N.W. 2d 512 (Ct. App. 1996), clearly states that an insurer cannot be made liable for interest on a Judgment under its policy of insurance if the policy terms do not provide for such an obligation. The Petitioner has completely ignored that authority, as well as other authorities on issues such as the propriety of the courts' application of equitable considerations.

(3) Finally, the Petitioner questions the propriety of the District Court's and Court of Appeals' conclusion that there were sufficient offers of payment in this case to toll any alleged accrual of interest in this case. However, Petitioner cannot and does not dispute the underlying facts that there were over one dozen offers of payment, including offers that were double General Casualty's policy limits.

In sum, the Petitioner's arguments are without merit. The Respondent has refrained from moving for costs or sanctions. However, two courts have now stated in their opinions that the Petitioner's arguments are frivolous. As the District Court stated, the Petitioner's counsel has needlessly squandered the resources of three courts and needlessly caused General Casualty to incur expenses to oppose his various motions, appeals and petitions over the course of nearly nine (now eleven) years.

The present Petition is merely a continuation of the Petitioner's pattern of pursuing unsupported motions and appeals, thus forcing General Casualty to incur even more needless expense. It is respectfully submitted that the Petition for Writ of Certiorari be denied.

STATEMENT OF THE CASE

The facts relevant to the Petition are undisputed and are properly reflected in the opinions of both the District Court and the Court of Appeals, which are attached to the Petitioner's submission.

This case arises out of a June 1, 1985 automobile accident. A bifurcated civil jury trial was held in the District Court for the Western District of Wisconsin in early October of 1987, with the jury returning with the damages portion of the verdict on October 9, 1987. As indicated in the Petitioner's Statement of the Case, an apparent clerical oversight resulted in judgment being entered only against the individual defendants, Heimbecker and Hellenbrand. However, judgement was not entered against General Casualty, a named defendant whose policy limits of $25,000 were entered as evidence at the trial.

As regards the procedural events after that point, including an abortive appeal before the Seventh Circuit, the court is referred to the succinct summaries given in the District Court's Opinion, Petitioner's Appendix, pp. 1-5 and the Court of Appeals' Opinion, Petitioner's Appendix, pp. 9-12.

As stated therein, it was not until over four and one-half years after the dismissal of the earlier abortive appeals that the Petitioner finally brought the Motion in the District Court which led to the order that is now the subject of this appeal. The Motion was filed with Judge Crabb, who was intimately familiar with the specifics of this case, having presided over the Trial and having entertained all Motions and hearings over the years after the Trial.[1] The Petitioner argued for entry of judgment in the

1. This does not include the 1994 case filed in Cook County, Illinois in which the Petitioner sought Judgment against General Casualty in the amount (Cont'd)

amount of $50,000 plus eight years of prejudgment interest (at 12%) on the $2.2 million dollar judgment entered against Heimbecker and Hellenbrand individually.

The District Court rejected those arguments. Petitioner then appealed to the Seventh Circuit, which also rejected his arguments, rather soundly, and he now brings this Petition to the Supreme Court of the United States.

The issues have now narrowed. The frivolous argument for double coverage has been dropped, as has any request for post-judgment interest. The refusal of the District Court to allow taxation of costs has likewise been dropped. The claim made in this Petition is that all prior courts have misapplied a Wisconsin statute, although the Petitioner does not respond to the cases cited by the Respondents and the Court of Appeals. Nor does the Petitioner even mention the contract provision at issue, although presumably that is the only basis for his recovery. He certainly does not dispute the validity of the terms of that contract, and never has. Finally, he characterizes the two prior courts' discussion about adequate tender as being based upon "circumstantial" evidence, without ever refuting the underlying factual basis documenting the many times the money was offered in this case.

Facts which are relevant, but which are not mentioned by the Petitioner, include the General Casualty policy language. The relevant terms of the policy are undisputed and state in relevant part:

(Cont'd)
of $25,000 (an amount he then refused to accept upon dismissal of that action and return to the federal District Court) Judge Crabb appropriately referred to that excursion as the Petitioner taking the "inexplicable step of suing defendant General Casualty in Cook County Illinois . . ." (Petitioner's Appendix, p. 4.)

SUPPLEMENTARY PAYMENTS

In addition to our limit of liability, we will pay on behalf of a covered person:

* * *

3. Interest accruing after a judgment is entered in any suit we defend. Our duty to pay interest ends when we offer to pay that part of the judgment which does not exceed our limit of liability for this coverage.

As the District Court held, General Casualty is only obligated under the contract to pay interest *after* a *judgment* is entered, and this obligation terminates when the policy limits are "offered".

Other facts which are undisputed in the record include all of the attempted "offers" to pay the undisputed policy limits of $25,000 to the Petitioner and his counsel. The relevant underlying facts were set forth in detail in the Affidavits submitted to both the Trial Court and the Court of Appeals. General Casualty therefore denies the contentions on pages 17 and 18 of the Petitioner claiming they never offered or tendered their $25,000 policy limits. Those contentions fly in the face of a well-documented record which was provided to the District Court and never refuted by the Petitioner — hardly the mere "circumstantial evidence" listed by Petitioner. Further, the Petitioner has never presented any contrary documentation to refute the clear and undisputed documentation submitted by General Casualty.

It thus remains as a documented and undisputed fact of record that over one dozen attempts were made by General Casualty to pay the policy limits to the Petitioner's counsel, as noted by both the District Court and the Court of Appeals. (Petitioner's Appendix, pp. 6, 9, 14-15.) Specifically, it is undisputed that General Casualty offered its policy limits on October 15, 1987, six days after the jury reached its damages verdict. (*Id.* at p. 6.) The District Court cited this date specifically, as did the Court of Appeals. The Petitioner failed to mention that date in his Petition to this Court.

Other facts not disputed or addressed by the Petitioner include all of the facts supporting the District Court's ruling that:

> Because it has been Plaintiff's counsel intransigence that has prevented the amount of defendants' obligation from being reduced to judgment, it would be unfair to hold General Casualty liable for prejudgment interest.

(Petitioner's Appendix, p. 7.)

The Court of Appeals clearly shared this conclusion.

STATEMENT OF STANDARD OF REVIEW

The Petitioner has indicated no standard of review. The Respondent's position is that the District Court's Opinion and Order was well within the sound discretion of that court and was correct as applying state law to the undisputed facts.

It is well established that a District Court's exercise of discretion will not be reversed unless it constitutes an abuse of

discretion. *See, e.g., Coyne-Delany v. Capital Dev. Bd. of State of Ill.*, 717 F.2d 385 (7th Cir. 1983). The Court of Appeals found no fault with any of the decisions of the District Court.

The District Court articulated its reasoning and gave ample support for its decision. The facts at the basis of the District Court's opinion are undisputed and documented. The salient features of the present litigation involved documented procedural history, representations made on record in front of the District Court, and correspondence submitted on Affidavit.

The substantive law at issue is state law. State law governs on contracts of insurance, and state law governs on the issue of prejudgment interest. *See Travelers Ins. Co. v. Transport Ins. Co.*, 846 F.2d 1048, 1053 (7th Cir. 1988). The District Court's application of the law to the facts was proper.

Finally, the District Court also properly interpreted the Wisconsin statutes at issue in this matter. The Court of Appeals, specifically, drew the Petitioner's attention to Wisconsin case law which is directly on point. The Petitioner had ignored that opinion, although cited by the Respondents, and ignores it once again in his presentation to this Court.

REASONS FOR DENYING THE WRIT

I.

GENERAL CASUALTY OWES NO INTEREST ON THE JUDGMENT AGAINST ITS INSUREDS.

Prejudgment interest is governed by state law. *See Travelers Ins. Co. v. Transport Ins. Co.*, 846 F.2d 1048, 1051 (7th Cir. 1988). The "federal court must look to state law to determine the propriety of prejudgment interest on a recovery." *Id.* at 1051.

General Casualty's obligations for interest, if any, under state law, are limited to the terms of its contract of insurance with its insured. An insurer's obligations in Wisconsin are determined by the terms of the contract of insurance. *See, e.g., City of Edgerton v. General Cas. Co.*, 184 Wis. 2d 750, 764, 517 N.W. 2d 463 (1994); *Schmude v. Hansen*, 28 Wis. 2d 326, 333, 137 N.W. 2d 61 (1965). Specifically, an insurer's obligation for payment of prejudgment interest depends on its policy provisions. It is unclear to what extent, if any, Petitioner now seeks reversal of lower court rulings that General Casualty is not responsible for payment of interest on any judgment against its insureds. To the extent the instant Petition does seek to address those rulings, its logic is faulty.

Petitioner's comments to the contrary, Wisconsin law does not impose interest on an insurer in excess of its policy limits or policy provisions. The case of *Blank v. USAA Property & Casualty Ins. Co.*, 200 Wis. 2d 270, 281, 546 N.W. 2d 512 (Ct. App. 1996) is directly on point, but is not mentioned by the Petitioner, despite being highlighted by the Respondent *and* the Court of Appeals. (Petitioner's Appendix p. 12.) *Blank* makes clear that it is the terms of the insurance contract which govern the insurer's obligation, if any, with regard to interest on a judgment:

> Section 814.14(4), Stats., does not impose interest on the verdict upon the insurer for sums in excess of policy limits. The statute merely directs the clerk how to compute the interest on the verdict; contrary to plaintiff's contention, whether the insurer and not the insured is to pay this interest depends upon the terms of their insurance contract.

Blank, at 281.

The *Blank* court cited both *Nichols v. United States Fidelity & Guaranty Co.*, 13 Wis. 2d 491, 501, 109 N.W. 2d 131, 136-137 (1961) and *McPhee v. American Motorists Ins. Co.*, 57 Wis. 2d 669, 672-673, 205 N.W. 2d 152 (1973), emphasizing that an insurer's obligations for interest on a judgment depend upon the language of the contract of insurance. The Petitioner claims the Court of Appeals ignored a "mandatory" state statute, yet he ignores the state law interpreting that statute.

The Petitioner also ignores the contract of insurance at issue in this case. As emphasized by both the District Court and the Court of Appeals, the relevant terms of the policy (cited in the Statement of the Case) are undisputed and clearly exclude any obligation for *pre*judgment interest.

The District Court held that General Casualty is only obligated under the contract to pay interest *after* a *judgment* is entered. This necessarily excludes responsibility for *pre*judgment interest. It also means that General Casualty's obligation to pay *any* interest *ends* when they *offer* to pay the limits of their liability. The District Court held as follows:

> Once [General Casualty] offered the policy limits on October 15, 1987, one week after the verdict was rendered and a week before entry of judgment, its obligation to pay interest expired.

(Petitioner's Appendix p. 6.)

II.

GENERAL CASUALTY OWES NO INTEREST ON THE AMOUNT OF THE $25,000 LIMIT OF LIABILITY.

A. General Casualty's Offer(s) Of Payment Tolled The Running Of Interest And The Petitioner Has Waived His Right To Claim Interest By His Failure To Accept Such Offers.

Had there been a valid Judgment timely entered against General Casualty, it would have owed its $25,000 limit of liability and any applicable statutory interest, whether prejudgment interest under Wisconsin law, or post-judgment interest under Federal law. However, interest would apply to *that* amount only, and would be tolled under Wisconsin law once a valid offer of payment of that amount was made to the Petitioner.

The only salient and relevant facts are: (1) no Judgment was initially rendered against General Casualty because Petitioner's counsel objected to entry of Judgment; and (2) General Casualty repeatedly made offers to pay the limit of liability immediately, including *before* trial, *during* trial, and within one week of the verdict. Once their offer of payment was refused, the accrual of interest ceases. The failure to accept the payment, and responsibility for loss of the "use" of that money, is on Petitioner's counsel.

Wisconsin law clearly establishes that a valid offer of payment which is refused tolls the running of interest. The Petitioner cited the cases of *Giffin v. Tigerton Lumber Co.*, 26 Wis. 2d 327, 132 N.W. 2d 572 (1965), and *Loehrke v. Wanta Builders, Inc.*, 151 Wis. 2d 695, 707, 445 N.W. 2d 717 (Ct. App. 1989) to support his argument that payment of less than the full

amount due cannot toll the running of interest. As found by both lower courts, $25,000 was the full amount due. Moreover, those same cases stand for the principle that when an offer of the amount owed is made, and rejected, the accrual of interest is tolled.

In *Giffin, supra,* at 334, the court explained that had the defendant offered the amount then determinable as owed, "[s]uch an action would have stopped the running of interest to the extent of the tender." *See also Loehrke, supra,* at 707. Similarly, in *Kiefert v. Maple Valley Mut. Home F. Ins. Co.*, 158 Wis. 340, 341-342, 148 N.W. 864 (1914), it was held: "the offer of a check constitutes a good tender so as to stop interest if no objection be made to it at the time on the ground that it is not legal tender, but it is refused on some ground, as for instance that it is not enough."

The tolling the accrual of interest makes good public policy and equitable sense. Both parties agree the reason behind providing statutory interest is to encourage prompt payment of judgments. *See Zintek v. Perchik*, 163 Wis. 2d 439, 479, 471 N.W. 2d 522 (Ct. App. 1991). The statutory accrual of interest provides a clear incentive to make timely offers of payment. The natural corollary of that principle, however, is that ***timely offers must be accepted***, and that a party cannot benefit from the statutory interest rate after having rejected a timely offer.

One valid offer is sufficient for tolling purposes. The District Court noted "innumerable" such offers in this case. The Court of Appeals added up thirteen times Petitioner's counsel rejected offers. As the District Court also noted, it was the intransigence of Petitioner's counsel and his refusal to accept the offer because he was maintaining a frivolous argument for "dual coverage," which caused the delay in payment.

B. There Is No Prejudgment Interest When The Amount Is Uncertain.

Another argument ignored by the Petitioner, despite being noted by the District Court, is the fact prejudgment interest is not properly awarded when the amount owed was never fixed or certain. Under Wisconsin law, as the District Court correctly explained, prejudgment interest is only appropriate if the amount owed is fixed and certain. *See, e.g., Northbrook Excess & Surplus v. Procter & Gamble*, 924 F.2d 633, 640 (7th Cir. 1991); *Wheeler v. John Deere Co.*, 986 F.2d 413, 416 (10th Cir. 1993); *See also Loehrke v. Wanta Builders, Inc.*, 151 Wis. 2d 695, 707, 445 N.W. 2d 717 (Ct. App. 1989).

The District Court observed that it was the Petitioner's counsel who "refused to identify the amount of the fixed sum for liability coverage owed by General Casualty." (Petitioner's Appendix, p. 7.) Again, as the record shows, Petitioner's counsel deliberately ignored the District Court's instructions in February of 1988 to simply agree that the amount of the judgment should be entered at $25,000. If the amount of General Casualty's obligation was not fixed and certain, then this doctrine also precludes the Petitioner from claiming prejudgment interest.

C. It Was Appropriate For The Court Of Appeals And The District Court To Apply Equitable Considerations.

The Petitioner asserts that the Court of Appeals' application of equitable considerations to deny an interest award is improper. The Petitioner is simply mistaken. Cases he cites, such as *West Virginia v. United States*, 479 U.S. 305, 311 n. 3, 107 S. Ct. 702, 706 n. 3 (1987) and *Board of Commissioners of Jackson County, Kansas v. United States*, 308 U.S. 343, 60 S. Ct. 285, 84 L. Ed. 313 (1939), prove just the opposite. The Petitioner cited to footnote three in *West Virginia*. He was evidently

referring to the first sentence, but he left out the next sentence, which states: "This is not to say that an equitable consideration such as laches cannot bar an otherwise valid claim for interest." *Id.* That essentially sums up the situation here, whether one wants to call it laches, tolling, waiver, or inequitable conduct.

Board of Commissioners also fails to support the Petitioner's arguments. The facts of that case are wholly dissimilar to the instant case, dealing as they do with the interplay between a treaty the United States made with the Pottawatomie tribe and local property tax law. However, the Court did indicate that "[t]he cases teach that interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness." *Board of Commissioners*, 308 U.S. 343 at 352.

Similarly, in *Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1334 (7th Cir. 1992), this Court explained:

> We remarked in *Williamson* that "[s]ubstantial, unexplained delay in filing suit might be a reason, because delay shifts the investment risk to the defendant, allowing the plaintiff to recover interest without bearing the corresponding risk." 817 F.2d at 1298. The Supreme Court reinforced this in *West Virginia* by stating that laches could justify a denial of interest. 479 U.S. at 311 n. 3, 107 S. Ct. at 706 n. 3.

The point is that the Court is not without discretion or power to refuse to award interest which accumulated *because of the delays and derelictions created by counsel* for the prevailing party. That conduct is amply detailed in the opinions of both courts below.

By claiming interest over the course of all these years, the Petitioner seeks to take advantage of the delay caused by the lack of final judgment against General Casualty. The Respondent has not found any cases presenting the same types of delay that were involved in this fact scenario, but there are several cases which appear comparably tortured. For the most part, these cases involve failures to seek timely correction of mandates after appeal. The principle which emerges from these cases is applicable here: a party may not extract a benefit of interest when the delays are caused by that party, and when the party has failed to take the easy and obvious measures required to correct the situation.

In *Vickers v. Chiles Drilling Co.*, 882 F.2d 158, 159 (5th Cir. 1989), the Court of Appeals explained the typical situation as follows:

> If an appellate court reverses or modifies a judgment with a direction that a judgment be entered against a party, the mandate from the appellate court must specifically order that interest run from the date of the first judgment, else interest runs from the date of the second, modified judgment. F.R.A.P. 37; *Gele v. Wilson*, 616 F.2d 146 (5th Cir. 1980); *Briggs v. Pennsylvania Railroad Co.*, 334 U.S. 304, 68 S. Ct. 1039, 92 L. Ed. 1403 (1948). Even if this is the result of inadvertence on the part of the appellate court, *the appropriate procedure is to file a motion to reform the mandate* under Federal Rule of Appellate Procedure 37. *Since no such motion was filed, we reverse* the district court insofar as it awarded post-judgment interest on Vickers' future losses, and render the judgment to grant interest on the award

> of $119,554.00 from September 29, 1988, the date of the second judgment in this case.

(Emphasis added.)

The Court of Appeals undoubtedly has the *power* to make corrections in its mandates as justice requires. However, the courts have consistently required diligence on the part of the party seeking correction, and have consistently prevented a delaying party from benefitting from self-created or self-perpetuated delay.[2] The Petitioner completely lacked such diligence in this case.

For instance, in *Lee v. Terminal Transport Co.*, 301 F.2d 234, 236 (7th Cir. 1962), the Petitioners sought belated correction of a Court of Appeal's mandate to receive post-judgment interest. The Court of Appeals rejected the plea owing to the excessive delay and explained that the defendants should not be made to pay for the Petitioner's delay.

> Plaintiffs have waited approximately 29 months from the time the mandate issued to seek this relief . . . Defendants should not now be penalized because of plaintiffs' subsequent abortive actions.

In *Bankers Life And Casualty Co. v. Bellanca Corporation*, 308 F.2d 759, 759 (7th Cir. 1962), *cert. denied*, 368 U.S. 827, 82 S. Ct. 47, the Court explained that its power is not available for the convenience (or abuse) of the litigants, and that a party who takes no timely action to seek correction is not entitled to benefit over the period of the delay.

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2. Those cases which involve a request for post-judgment interest on a claim which was never rendered into a final judgment emphasize that delays are important factors in weighing against allowance of the claim. *See, e.g., Reaves v. Ole Man River Towing, Inc.*, 761 F.2d 1111 (5th Cir. 1985).

> Bankers took no timely action in this Court to request a recall and modification of the mandate for the purpose of obtaining the relief to which it claims it is entitled. It is now too late for it to do so. While the power to act on its mandate after the term expires survives to protect the integrity of the court's own processes, it has not been held to survive for the convenience of litigants.

(Citations omitted.)

Other circuits have applied these same principles. In *Nat. Sur. Corp. v. Charles Carter & Co., Inc.*, 621 F.2d 739, 741-742 (5th Cir. 1980), the issue was whether the petitioner could still seek correction on the failure of the Court of Appeals to include prejudgment interest in its mandate. The Court of Appeals explained that it does have that power, but that to secure such relief a party must act promptly when it knows of the mistake. As here, the party seeking the correction in *National Surety* waited many years before seeking correction of the claimed mistakes. The court denied relief because the delay was extreme and essentially unexcused.

> National Surety's *excessive delay in seeking reform* of our November 23, 1976 mandate *weighs most heavily against any grant of relief.* The mandate clearly precluded an award of prejudgment interest on remand, and National Surety *should have acted promptly to place its objection to the mandate before this Court.*

Id. at 741-742 (emphasis added.)

The court in *National Surety* noted that despite knowing of the claimed error, no petition for rehearing or motion for correction was filed. *See also Gele v. Wilson*, 616 F.2d 146, 149 (5th Cir. 1980), in which the court explained:

> [A] party who conceives himself to be entitled to interest from a date other than judgment on remand should seek reformation of this court's mandate in a petition for rehearing . . . One who fails to seek such a reformation may not later complain that the district court should have calculated interest from an earlier date.

(Citations omitted.)

Finally, in *Explosives Corp. of America v. Garlam Ent. Corp.*, 817 F.2d 894 (1st Cir. 1987), *cert. denied*, 484 U.S. 925, 108 S. Ct. 286-287, and *LeRoy v. City of Houston*, 906 F.2d 1068 (5th Cir. 1990), a couple of cases with facts in part strikingly similar to the situation created by Petitioner's counsel here, the courts denied relief. In *Explosives*, the Court of Appeals refused to allow interest from the initial judgment where the party never sought a Rule 54(b) determination, "even though it had been alerted to the problem" by the court in time to properly seek correction, but had sought an abortive appeal instead of seeking a proper determination of the amount owed in the District Court. *Explosives*, at 903-904. The Petitioner was given such an opportunity by the District Court in February of 1988, and declined.

In *LeRoy*, the court emphasized that part of the reason for denying the relief requested was the deliberate refusal of the party to follow the clear direction given it by the court on how to correct the defect in a timely manner. *LeRoy*, at 1074-1075.

In that case, as here, the party "adamantly refused to file a motion to recall the mandate," and instead went to another court which had no authority to grant the relief requested, despite the fact that the court drew this to the party's attention, and despite the clear case law which showed the futility of that step. *Id.* at 1075. As here, "[n]o reason or excuse for this failure [to take the recommended and proper procedure] has ever been proffered." The Court of Appeals concluded:

> The consequence of taking this position was a vast waste of time and much unseemly wrangling about collection of a judgment which would have been paid had it not included that which our mandate did not authorize and hence precluded.

Id.

The one Wisconsin case cited by the Petitioner on this topic, *Anderson v. Kojo*, 110 Wis. 2d 22, 327 N.W. 2d 195 (1982), is not on point. *Anderson* concerns collection on a Judgment, and is otherwise distinguishable on its facts. *Anderson* does *not* hold that a plaintiff is entitled to interest and costs upon any delay *"even if occasioned by the plaintiff,"* as suggested by Petitioner. (Petition for Writ, p. 15.) To the contrary, *Anderson* substantiates the argument that equitable doctrines *remain* applicable, even within the periods allowed for statutory time limitations. As such, the *Anderson* opinion serves to defeat, not support, Petitioner's position. The case does not stand for the proposition that an equitable defense of laches was not available in such a situation, it merely found that the doctrine did not apply under the facts involved in that case. *Anderson* lacked an essential element found in this case — the Defendant's numerous offers to pay their liability, even before a Judgment was entered against them.

The Petitioner's reference to General Casualty's "enjoyment of the benefit" of retaining the money must also be completely rejected. That characterization of the actual events is hardly accurate and the implication that equity would be served by punishing General Casualty for the Petitioner's delay and intransigence was properly rejected by the District Court and the Court of Appeals.

No money was "wrongly retained." General Casualty offered the money repeatedly. If anything, those offers were "wrongly" refused based upon whatever excuse Petitioner's counsel found convenient at the time, be it the "dual coverage" argument, the alleged but never pursued claim of bad faith (which was threatened but then dropped), or simply failure to respond to the offers. As the District Court told Petitioner's counsel at the hearing in September of 1995, "You could have had that money for your client seven and a half years ago." As of the writing of this Brief, it has now actually been more than 11 years since the policy limits were first offered to Petitioner.

D. No Interest Is Due Merely Because General Casualty Did Not Immediately Pay Its Policy Limits Into Court.

Petitioner's suggestion that General Casualty is somehow responsible for the interest because it did not pay the disputed sum into the court is supported neither in Wisconsin nor federal law. There is no procedure requiring payment of disputed sums into court. Even if there were, payment into the court would not have secured any interest for the Petitioner or any sort of repose for General Casualty. Statutory interest does not accrue on payments made into the court. The Petitioner would not have had access to the money until a satisfaction of judgment would have been agreed upon, which his counsel was unwilling to do.

The same result flows from the tolling doctrine. It is the

rejection of a valid offer of payment which terminated General Casualty's obligation under its contract and which would have precluded any recourse against the defendants directly for said interest after such an offer was refused.

To extract the award from a nondelinquent party at this point would be punitive, and that is not sanctioned in Wisconsin law. The District Court properly found that it was Petitioner's counsel's fault for refusing to accept the offers and for inexplicably refusing to take the easy and obvious steps *suggested to him by the District Court* to make the amount known and certain and allow satisfaction of the Judgment. The Court of Appeals agreed. The Petitioner's delinquent actions preclude him from benefiting from the delay which he caused in the first place.

In sum, the Petitioner cannot expand General Casualty's obligations based upon his own counsel's actions or inactions. The method of correcting the error and securing Petitioner's money was always available to Petitioner's counsel and was suggested to him by the court. The method was simple: agree to a judgment in the amount of the policy limits and accept General Casualty's offer of that sum. Their failure to make use of the appropriate procedures, combined with the demonstrated frivolity of the original argument which they used to "justify" their intransigence, leaves no basis for allowing them to benefit from their own unnecessary, and increasingly costly, delay.

III.

NO ISSUE PRESENTED BY THE PETITION REQUIRES THE SUPREME COURT'S ATTENTION.

The Petitioner claims the Court of Appeals' decision is violative of this Court's decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). Petitioner oversimplifies that decision, but in general the

Respondent does not disagree with the contention that *Erie* stands for the proposition that a federal court must apply state law in a diversity case.

That is exactly what the District Court and the Court of Appeals have done. Relevant state law pertaining to these issues was applied. Discretion was utilized where appropriate. Equities were correctly balanced where suitable. State law was not improperly applied. Indeed, if anyone did not understand the applicable state law, it wasn't the lower courts. The District Court noted that the trial in this matter was "made much more difficult than it should have been by plaintiff's counsel's unfamiliarity with Wisconsin law . . ." (Petitioner's Appendix, p. 2.)

In its decision, the Court of Appeals made this observation of the contentions asserted by the Petitioner: "Some might find this argument creative; most would find it frivolous. None would find it persuasive." (Petitioner's Appendix, p. 10.)

That sums up the Petitioner's case fairly well. There is nothing noteworthy about this case such that it would justify this Court's review.

CONCLUSION

The Court of Appeals found that there were only two hurdles preventing the Petitioner from prevailing in this case: the law and common sense. For the reasons stated, the Court should reject the Petition and make whatever awards of costs, or double costs, it finds appropriate.

Respectfully submitted,

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